BOOK REVIEWS

SOME PROBLEMS OF EQUITY. By Zechariah Chafee, Jr. University of Michigan Press, Ann Arbor, 1950. Pp. xiv, 441. $4.50.

Zechariah Chafee, Jr., is one of the most remarkable manifestations of our present day jurisprudence, using that word in the broadest sense. It is hard to think whom one would name to compare with him for his combination of wit, learning, urbanity, common sense and good will. Research would probably reveal that, in spite of the "Junior," he is one of the elder statesmen of the profession, but there is no trace of age in the somewhat puckish but completely unjaundiced eye with which he surveys the parade of judges, often peering under the heavy robes to note the spindly shanks that carry them. Beyond any doubt, a contract to buy Mr. Chafee would be specifically enforceable.

Some Problems of Equity, the second series of Thomas M. Cooley Lectures, consists of five lectures delivered in 1949, here expanded into seven chapters, and two other chapters that are revisions of earlier law review articles, one originally published in this Review and the other in the Harvard Law Review. Mr. Chafee nowhere claims for them any great formal unity, but they are tied together in a very real way by a common theme, namely, their stress on the rules of carrying-on (this clumsy phrase is used as less technical than "procedure") by which the court of equity lives.

To the present reviewer the most interesting of the materials are the three chapters on "Coming Into Equity with Clean Hands," and the two concluding chapters on "Lack of Power and Mistaken Use of Power." The first group may be well described as amounting to a tragi-comedy, with the comedy at first conspicuous. "The most amusing maxim of equity is 'He who comes into Equity must come with clean hands.' It has given rise to many interesting cases and poor jokes," Mr. Chafee remarks.[1] Later on, tragedy tends more and more to preponderate as it becomes more and more apparent how much harm has been done by the habit of courts of looking no further than at the abstract moral position of the plaintiff and so failing to appraise the moral position of the defendant and the moral consequences to the community that may result from so short-sighted a view.

Nothing can be more dreadful than the sanctimoniousness of judges, and nowhere can such a great collection of it be found as here. Moralizing should be left to experts; they can do it with at least some restraint, some finesse, some sense of proportion, and, occasionally, even some humor. In the hands of judges it is nearly always both sticky and stupid.

1. P. 1.

The story is most sordid in the chapter dealing chiefly with matrimonial cases. "It was an evil day," says Mr. Chafee, "when the first American judge to speak of clean hands had the bright idea of injecting the maxim into the very place where it would work its greatest mischief." [2] It is the job of the judge in a matrimonial case to consider all the interests involved "and do his best to evaluate them with reference to the whole family. He cannot afford to waste his efforts on deciding how to punish one person who happens to be the plaintiff. He is asked to reorganize the family and not to try an offender. . . . The clean hands maxim is an impertinent intrusion on a very difficult and important judicial job." [3]

Mr. Chafee refers to a West Virginia judge who had before him a divorce case involving misconduct on both sides and who reasoned thus: "What must we say about the conduct of this woman? God's noblest creation is a good woman. Her virtue is at the summit of human attributes." [4] Accordingly, Mr. Chafee remarks, "Having notably fallen below this ideal femininity, she was left on her husband's hands and he on hers." [5]

These very slight slices of Chafee may be unfair to the author in two ways. First they may suggest that he has done no more than make bright animadversions on the follies of judges and the law of divorce. On the contrary, this is only one aspect of a carefully worked out series of articles whose main themes are that the doctrine of clean hands is not and should not be exclusively a doctrine of equity—as far as it makes sense it should apply equally in suits at law and in equity—but that too often the doctrine, whether in law or equity, is applied in a spirit of shortsighted sanctimoniousness which ultimately is more immoral than the plaintiff's immorality at which it so ostentatiously lifts horrified hands.

Second, they may suggest that the author's criticism of divorce law is shortsighted and superficial. Again, quite the contrary. No one realizes better the difficulties of the problem, nor sees more clearly that the trouble with the law is not the law but the climate of opinion in which it has to live, a climate largely resembling a storm on a weather map. When and if it is ever possible to get something like a rational agreement as to what should be done about the eternal male who can live peaceably neither with nor without the eternal female, the law will have little difficulty in implementing it. Pending this devoutly-to-be-wished, if unlikely, consummation, Mr. Chafee helps by calling attention to some of the horrors of the law which would seem unnecessary in any climate.

Almost the antithesis (in manner though not in merit or seriousness) of Mr. Chafee's discussion of the birth and growth of the clean hands doctrine is his thoughtful and learned analysis of the question: is equity jurisdiction really jurisdictional? Overwhelmingly, at least to the mind

2. P. 73.
3. P. 75.
4. Edwards v. Edwards, 106 W. Va. 446, 455, 145 S.E. 813, 816 (1928).
5. P. 80.

of this reviewer, he demonstrates that it is not. As he says, the case is already properly in court; the only question is *how* the court should handle it. If he gives specific performance when only damages should be given, the error is no more jurisdictional than if he gives damages when, on a true view of the facts, no relief at all should have been given because no contract was ever made.

This fits rather neatly into a pet idea of the reviewer's, though of course one for which he claims no originality, namely that equity is currently transitional, and that it is moving away from the time when it was truly a separate and independent body of jurisprudence, with traditions, doctrines and practices all its own, towards the time when it will be just the sum total of a group of remedies in the form book. Certainly, when the latter time comes it will be absurd to say that a court lacks jurisdiction when it mistakenly grants specific performance instead of assumpsit, but not when it grants assumpsit instead of trover.

Mr. Chafee makes two characteristic comments which tend to support his views: there should be a bright line, *i.e.*, nothing should be treated as jurisdictional unless the limits of the jurisdiction are clearly marked, so as to prevent expensive floundering; and first things should be first, *i.e.*, nothing should be treated as jurisdictional which is not naturally susceptible of determination at the outset of the trial. Treating equity jurisdiction as jurisdictional plainly offends both canons.

He then proceeds with amazing ingenuity and dexterity to deal with the authorities that could be cited against his views. Considerations of space forbid analyzing his analysis; it is enough to say that it is well worth reading.

These scattered and perhaps irreverent remarks are quite inadequate to set forth anything like the full extent and depth of Mr. Chafee's thinking; it is hoped that they may perhaps suggest something of the color and flavor of a most fascinating book.

Philip Mechem.†

LAW AND SOCIAL ACTION. By Alexander H. Pekelis. Cornell University Press, Ithaca and New York, 1950. Pp. xi, 272. $3.50.

It is difficult to believe that the brilliant writings on American law assembled in this book could have been produced by a man who spent only five years in this, the sixth country in which he lived. Ultimately, however, one realizes that it is just because the writer had so peripatetic a background that he was able to approach the law of the land in which he spent his last years unhampered by settled patterns of thought.

Pekelis was born in Russia in 1902 and left that country in 1919. His subsequent studies included years in Leipzig, Vienna, Florence, Rome and

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London. He taught law in Italy from 1931 until 1939, when the Fascist government's oppression of Jews became so severe that he was forced to leave. After practicing law in France for two years, he left in 1941, just as the Nazis were entering, and came to this country. He was killed in an airplane accident in 1946.

Although he was appointed professor at the graduate faculty of the New School for Social Research immediately on his arrival here, he found it impossible to settle down in a country whose legal system he had not mastered. Hence, he enrolled in Columbia Law School where he was ultimately elected editor in chief of the Law Review. After his graduation in 1944 he was made graduate editor in chief, a post created especially for him.

During his five years in this country, Pekelis wrote extensively. A part of his writings, gathered by his friends, have been printed in this book edited by Prof. Milton R. Konvitz of Cornell Law School. From the point of view of the lawyer, their outstanding characteristic is the writer's unfettered and far-ranging exploration of marginal areas in the domain of human rights. In Pekelis' own words, he was most interested in "the formulation of new and sometimes controversial claims, based on propositions which are on the very frontier of legal thinking" and requiring "frontier imagination and frontier ingenuity." [1]

Pekelis' freedom from customary shackles, stemming from a comprehensive view of the law, past and present, of two continents and half a dozen countries can be seen again and again in these essays. It may be seen in his approach to the problem caused by the fact that the law of libel gives neither the Jewish community nor the Jewish individual any protection against the gross untruths disseminated by anti-Semites. He was able to put his finger on the basic difficulty, the fact that modern law, permeated by Renaissance individualism, "has lost its feeling for collective rights or group responsibilities. This attitude, which is based on the recognition of the value of human personality, has made for much progress in human relations. But in its blindness to group relations it fails to conform with reality." [2]

Proceeding from this he is able to suggest a possible line of defense. The group itself must establish a right of action against its attackers. It must have the right to organize and impose economic sanctions against its defamers. Under existing law, an organized boycott of a newspaper, for example, may subject the group to damages. Pekelis urges minorities to follow the example of the organized labor movement which defied an adverse set of precedents and ultimately succeeded in transforming picketing from an illegal activity to a constitutional right.

A broader concept, developed in several of the papers in this volume, stemmed from the writer's analysis of the nature of the threat to American

1. P. 258.
2. P. 188.

democratic freedoms. Cutting through our traditional belief that Americans need protection only from oppression by the government, Pekelis stressed the fact that America "is in fact a federation not merely of forty-eight states, subdivided into counties and towns, but of a considerably greater number of private sovereignties, governments, and communities as well." [3] Recognizing that some racial and religious discrimination is directly caused by governments, he argued that a far greater amount is caused by financial institutions, real estate boards, privately supported universities, and other "private governments" which so far have entirely escaped the restraints of the Constitution. He urged a bold attempt to end the situation in which "private governments hollow out the content of freedom and equality, leaving a well-polished shell." [4]

Pekelis practiced law in both Italy and France. He knew, therefore, that law is a subject not only for broad philosophical analysis but also for application to concrete cases. After his graduation from Columbia Law School, he became chief consultant to the Commission on Law and Social Action of the American Jewish Congress, which post he held at the time of his death. This book contains two excerpts from briefs which he wrote for the American Jewish Congress while serving in that capacity.

One of these is a brief amicus filed in *Westminster School District v. Mendez*,[5] in which the court sustained a challenge to the segregation of children of Mexican and Latin descent in a California school district. In an attack on the institution of segregation itself, Pekelis passed over the traditional argument that physical discrimination is inevitable under segregation. He elaborated instead the argument that "Whenever a group, considered as 'inferior' by the prevailing standards of a community, is segregated by official action from the socially dominant group, the very fact of official segregation, whether or not 'equal' physical facilities are being furnished to both groups, is a humiliating and discriminatory denial of equality to the group considered 'inferior' and a violation of the Constitution of the United States and of treaties duly entered into under its authority." [6] His argument was subsequently adopted by the Solicitor General in the brief which he filed on behalf of the U. S. Government in *Henderson v. United States* [7] condemning segregation in interstate railway dining cars.

Even more daring was Pekelis' brief in the *Daily News* case, a proceeding before the Federal Communications Commission to determine which of 17 applicants for five F.M. radio channels in New York City should be granted construction permits. Here he challenged traditional civil libertarian views to urge that the Commission was required to accept evidence that one of the applicants, a newspaper, had treated minorities

3. P. 98.
4. P. 228.
5. 161 F.2d 774 (9th Cir. 1947).
6. P. 161.
7. 339 U.S. 816 (1950).

in a provocative and discriminatory fashion in its editorial and news columns. Pointing out that the Supreme Court had recognized that the airwaves cannot be open to all [8] and that the Commission had been directed by law to make them available on the basis of "public convenience, interest, or necessity," [9] he urged that the evidence of bias on the part of one of the applicants, offered by the American Jewish Congress, was necessary in order to determine "the ability of the licensee to serve the First Amendment's basic aims of information, discussion, and enlightenment." [10]

Pekelis' first work for the American Jewish Congress was the formulation of a program for its newly-formed Commission on Law and Social Action. The resultant document, which appears at the end of this book, summarizes much of what goes before. It reveals not only his understanding of how the law can be used either to obliterate or preserve a people but also his deep belief that the Jewish people must strive for more than mere protection against discrimination and oppression. He believed that the continuing existence of the Jewish people was a historical symbol of "the mysterious superiority of weaponless spirit over the physical forces which apparently dominate the world." [11]

No book review of acceptable length can cover all the subjects with which Pekelis dealt. The importance of this book is that it discusses matters of vital importance to America today and does so from so long a point of view that it is bound to provide food for thought for many years to come. Most of it is controversial and most readers will find much to disagree with. Indeed it is likely that if Pekelis were alive today he would himself question his expressions of confidence in the ability and willingness of the United States Supreme Court to protect our basic liberties.[12] But many of his suggestions have given such useful guidance since his death to those engaged in the struggle for the goal which he described as "full equality in a free society" that we can be assured that his work will long continue to be studied.

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PRE-TRIAL. By Harry D. Nims. Baker, Voorhis & Co., Inc., New York, 1951. Pp. xviii, 334. $5.75.

Mr. Nims' work on pre-trial conference was prepared at the suggestion of the Pre-Trial Committee of the Judicial Conference, under the auspices of that committee and of the Council of the Section of Judicial Administration of the American Bar Association. As stated on the jacket,

8. National Broadcasting Co. v. United States, 319 U.S. 190 (1943).
9. 49 STAT. 1475 (1936), 47 U.S.C. § 307 (1946).
10. P. 145.
11. P. 220.
12. Pp. 26, 194ff. See Harper and Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—an Appraisal of Certiorari*, 99 U. OF PA. L. REV. 293 (1950).

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"This work represents the first effort to record under one cover the manifold methods and techniques employed by the judges who are successfully using pre-trial procedure." The method followed in this effort is, for the most part, copious quotation of communications from judges and lawyers in jurisdictions throughout the country concerning the manner and effectiveness of pre-trial in their respective localities. Necessarily, this involves serious difficulties in organization of the material at hand, which may explain the rather disjointed presentation of the subject matter. The attempt to present a broad sampling of professional opinion concerning techniques and effectiveness of pre-trial conferences may also be to blame for the fact that much of the material is repetitive.

As must be apparent to anyone who has participated in pre-trial conferences, the variations in manner of conducting pre-trial conferences are as numerous as the judges and lawyers participating in them. Shall the conference be held in open court or in chambers? Shall the conference be conducted by the judge who will try the case or by a different judge? Shall the court take the initiative in promoting settlement discussions or shall any consideration of settlement be avoided? These are only a few of the questions which a reading of Mr. Nims' book will show have been answered differently by different judges. It is to be regretted, however, that the author has not attempted to analyze the various answers to these questions and that he has not attempted to draw any conclusions concerning the merits of the answers he has received.

The purpose of the book, as made clear not only by the author but also by Mr. Gallagher in his introduction and by the nature of the sponsoring organizations, is to promote the use of the pre-trial conference. The collection of numerous endorsements of pre-trial conferences by courts and lawyers who have used the procedure serves this purpose—particularly in a jurisdiction such as Pennsylvania where attempts to use the pre-trial conference device in state courts have met with little enthusiasm from bench and bar. The comments and statistics collected by Mr. Nims demonstrate that pre-trial is useful in large metropolitan areas and, as well, in smaller communities. In urban areas, where a very high percentage of personal injury litigation accounts for congestion of court calendars, pre-trial conferences are frequently aimed at producing settlements. In the average personal injury suit, there is little else that can be accomplished at pre-trial, since the issues are usually clear and simple and technical objections on matters of proof are relatively uncommon. Pre-trials have been of marked assistance in disposing of personal injury cases destined to be settled, with the result that settlement is effected sufficiently in advance of the trial date to facilitate accurate trial scheduling of cases which cannot be settled. This produces substantial savings in expense and in the time of court, lawyers, parties and witnesses. In smaller communities, where the ratio of personal injury litigation is not so high, pre-trial aimed at simplification of issues and elimination of technical questions of proof

has resulted in comparable economies in time and expense, with settlement a fairly common by-product.

In demonstrating the usefulness of pre-trial in many different circumstances, Mr. Nims' work has served its promotional purpose. The appendix of one-hundred pages is rich with examples of pre-trial rules, conferences, orders and stipulations. These should be of real value to any court or bar committee considering adopting a program of pre-trial conferences. Except for its usefulness in these connections, it is difficult to see what purpose is served by Mr. Nims' work: the presentation of the material does not lend itself to easy or interesting reading; the recording of the many varied methods now in use is of little help to the practitioner interested in informing himself as to how to prepare for participation in a pre-trial conference; and the subject of pre-trial is one so peculiarly within the realm of the trial court's discretion that it does not lend itself to extended analysis of any controlling legal principles or precedents.

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